



CHAIRMAN

DOCKET FILE COPY ORIGINAL  
Federal Communications Commission  
Washington, D.C.

02-278

December 30, 2004

The Honorable Fred Upton  
Chairman  
Subcommittee on Telecommunications and the Internet  
Committee on Energy and Commerce  
U.S. House of Representatives  
2125 Rayburn House Office Building  
Washington, D.C. 20515

Dear Chairman Upton:

Thank you for your letter of December 14, 2004, regarding the Commission's recent amendments to the rules implementing the Telephone Consumer Protection Act of 1991 (TCPA). In your correspondence, you urge the Commission to explicitly clarify that calls made to home-based business and some residential consumers engaging in commercial sales are outside the scope of the TCPA.

As you noted in your letter, the TCPA was enacted to address certain telemarketing practices, which Congress found to be an invasion of consumer privacy and even a risk to public safety. On July 3, 2003, the Commission released a Report and Order in CG Docket No. 02-278, which adopted rules establishing a national do-not-call registry and other amendments to its telemarketing rules. In the Report and Order, the Commission emphasized that calls that do not constitute "telephone solicitations" as defined in the TCPA will not be precluded by the national do-not-call list, and that the rules will not prohibit calls to businesses. Following the release of the Report and Order, the Commission received over 60 petitions for reconsideration and/or clarification of the amended rules, including petitions filed by the Direct Marketing Association (DMA) and the National Association of Realtors (NAR). The DMA noted its concern with calls to home numbers that are also used for business purposes, while NAR maintained that calls from real estate agents to individuals advertising their properties as "For Sale By Owner" fall outside the scope of the do-not-call rules. These petitions are currently under review and pending before the Commission. Therefore, we have placed a copy of your correspondence in the public record for this proceeding.

We will consider your views carefully along with the record developed in the reconsideration proceeding. I appreciate your comments and support for the federal do-not-call list. Please do not hesitate to contact me if I can be of further assistance.

Sincerely,

Michael K. Powell

**FRED UPTON**  
6TH DISTRICT, MICHIGAN

**ENERGY AND COMMERCE  
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AND THE INTERNET SUBCOMMITTEE  
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21ST CENTURY COMPETITIVENESS  
SUBCOMMITTEE  
EDUCATION REFORM SUBCOMMITTEE



**Congress of the United States  
House of Representatives**

December 14, 2004

The Honorable Michael K. Powell  
Chairman  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Dear Chairman Powell:

I would like to draw your attention to an outstanding issue pending before the Federal Communications Commission (FCC) stemming from the agency's 2003 Report and Order implementing the Telephone Consumer Protection Act (TCPA). As the Commission reconsiders its rules on telemarketing, we urge the Commission to explicitly clarify that calls made to home-based business and some residential consumers engaging in commercial sales are outside the scope of the TCPA.

As you know, Congress enacted the TCPA in 1991 for the purpose of protecting individual person's privacy and harassment from unwanted telemarketing calls. The do-not-call rules were specifically aimed at prohibiting certain calls to residential subscribers. Significantly, Congress wrote the law to shield consumers but not to disrupt the normal course of business calls to those selling goods and services.

The Federal Trade Commission already has clarified that the do-not-call rules do not apply to home-based businesses.<sup>1</sup> This interpretation clearly makes sense in the context of the do-not-call rules because here a person has deliberately and consciously entered the market for the purpose of engaging in a business transaction.

Home-based businesses are common today. Application of the business exception is warranted in these cases. However, we would also argue that the exception should be applied in those situations where residential subscribers enter into the market to engage in sophisticated and/or complex business transactions that involve numerous interactions with firms offering services in support of that sales transaction as well. This is the case, for example, in the residential real estate market context.

We all have seen signs by homeowners looking to sell their home -- they often place advertisements on their lawn indicating that the property is "for sale by owner" ("FSBO") and provide a telephone number to call. However, what was once an

<sup>1</sup> 47 U.S.C. § 227(c)(1); see also 47 C.F.R. § 64.1200(c)(1) & (2), (d) (referring to calls to residential subscribers).

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undertaking of only a very small number of homeowners is now a significant segment of the home sales market. In 2003, for example, approximately fourteen percent of the over 6 million home sales were sold by owners without the help of a listing agent.<sup>2</sup>

Additionally, a growing number of firms assist the homeowner who is selling their own home today. The services provided by these firms allow these homesellers to market a home in a manner that is sometimes indistinguishable from those used by the real estate professional. Firms like ForSaleByOwner.com, Help-You-Sell and Buy Owner provide the homeowner with a range of services that can include the a listing in the Multiple Listing Services (MLS) used by real estate professionals, professionally produced signage, marketing websites with multiple photos and/or video home tours of the home, ads on a corporate website or in a magazine of home for sale by owners, open house flyers, 24-hour information hotlines and other equally sophisticated or professional marketing means.

Also setting the FSBO residential subscriber apart from other residential subscribers who might sell a used appliance or vehicle is the fact that the FSBO seller must also interact – oftentimes via phone - with a wide range of other service providers required by terms of the home sale. These include appraisers, home inspectors, pest control services, surveyors, title and/or escrow companies, lawyers, roof inspection services, etc. In their role as the manager of their home sale, the FSBO seller acts in the same capacity as the real estate sales agent and must be accessible to and interact with a very wide range of service providers who may or may not be acting at their request. This, I believe, puts the FSBO in a very different class than the typical residential subscriber or even one who is selling an occasional personal item.

Given the size of the home-based business segment and the size, complexity and sophistication of some financial transactions engaged in by residential subscribers, I believe that it is important that the FCC clarify that calls to home-based businesses are not covered by the do-not-call requirements and that in circumstances where a person has deliberately and consciously entered the market to engage in a complex and sophisticated financial transaction, such as the sale of a home, that person clearly is doing business and should be treated as such by the FCC's rules.

Very truly yours,



Fred Upton

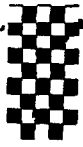
Chairman

House Energy and Commerce

Subcommittee on Telecommunications and the Internet

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<sup>2</sup> While fourteen percent of homes sold in 2003 were sold by owners, the number of homeowners who initially try to sell their homes without the help of a real estate professional is typically higher. Many homes originally listed as for sale by owner are ultimately sold by a real estate professional because professionals have expertise in dealing with the complexities associated with selling property.



HOUSE ENERGY AND COMMERCE  
SUBCOMMITTEE ON TELECOMMUNICATIONS AND THE INTERNET

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TO: CHAIRMAN POWELL

FAX #: 418-2801

FROM: WILL NORDWIND

DATE: 12/14/04

RE: TCPA

PAGES TO FOLLOW: 2

MESSAGE: \_\_\_\_\_

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